

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ADOLFO GUTIERREZ AVILA, JR.,

Case No. 19-CV-3112 (PJS/ECW)

Petitioner,

v.

ORDER

VICKY JANSSEN, MCF-RC Warden,

Respondent.

Petitioner Adolfo Gutierrez Avila, Jr., was convicted in state court of two counts of criminal sexual conduct and was sentenced to 144 months in prison on each count, to be served consecutively. Avila filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. The Court recently adopted the Report and Recommendation of Magistrate Judge Elizabeth Cowan Wright and dismissed his petition with prejudice, as his federal claims are procedurally barred and his state-law claim is not cognizable under § 2254. *See* ECF No. 32.

This matter is before the Court on Avila's motion for relief from judgment under Fed. R. Civ. P. 60. Avila does not identify the subsection of Rule 60 under which he is proceeding, but he generally attacks his convictions on the same grounds presented in his habeas petition, except that he now characterizes the state trial judge's actions and decisions as "fraud."

To the extent Avila's arguments can be understood as new theories for relief on the merits, they are "second or successive" claims under 28 U.S.C. § 2244(b) that cannot be entertained by this Court unless Avila first obtains permission from the United States Court of Appeals for the Eighth Circuit. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–32 (2005). Likewise, to the extent Avila continues to press his state-law claim concerning the statute of limitations, it is also a second or successive claim that must be dismissed. *Id.* To the extent Avila is simply rehashing his arguments on the merits of his federal claims, his arguments are irrelevant, as the Court dismissed those claims on procedural grounds. Finally, to the extent Avila is attacking the Court's ruling that his federal claims are procedurally barred, he has failed to meet any of the requirements for relief under Rule 60(b).¹ *See Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999) (Rule 60(b) "is not a vehicle for simple reargument on the merits").

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein,
IT IS HEREBY ORDERED THAT:

¹Along with his motion, Avila has submitted a number of exhibits, at least some of which were previously submitted, and has highlighted numerous instances in which, during his state-court proceedings, he or his counsel claimed a violation of his federal rights. None of these exhibits changes the fact that, as the Court has already explained, Avila did not assert a violation of his federal rights in his petition for review to the Minnesota Supreme Court. *See* ECF No. 21-1 at 145–52; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (to satisfy exhaustion requirement, petitioner must petition for review to state's highest court, even if that review is discretionary).

1. Petitioner's motion for relief from judgment under Fed. R. Civ. P. 60 [ECF No. 35] is DENIED.
2. To the extent a certificate of appealability is necessary, no certificate will issue.

Dated: March 2, 2021

s/Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge